United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-2610

****

UNITED STATES OF AMERICA,

APPELLEE,

-v-

JAMES HENRY ROLLINS, a/k/a,
LEE EVANS

APPELLANT

****

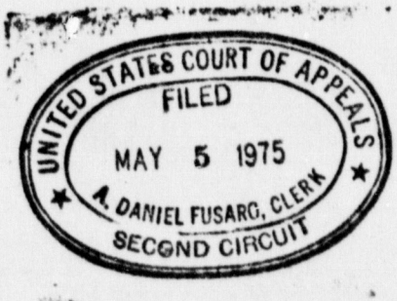
DOCKET NO. 74-2610

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT



ROBERT R. CODY
PRO-se
BOX 1000
lewisburg, Pa.

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IV. WAS THE JURY'S VERDICT IMPROPERLY AND PREJUDICIALLY INFLUENCED BY THE EXCESSIVE PARTICIPATION OF THE TRIAL JUDGE IN THE TRIAL AND BY HIS GROSSLY INADEQUATE INSTRUCTIONS TO THE JURY?

REFERENCE TO PARTIES AND RULINGS

1. Defendant on or about October 10, 1974, made several oral motions to dismiss the indictment, which were all denied. (See transcript October 10, 1974)

2. On or about October 22, 1974, the day of the trial, defendant made several motions in writing to dismiss the indictment. They were all denied summarily by the Court without them being read. (Tr 2-4)

3. On the morning of the trial defendant found out that two passports would be offered into evidence. He was presented with the affidavit for a search warrant and the search warrant. He had only a few minutes to look them over and then the Judge made a ruling as to probable cause on his motion to suppress. Judge Cannella without even reading the documents ruled that there was probable cause for the issuance of the search warrant even though the affidavit for the search warrant was unverified and the seizure of the passports exceeded the bounds of the search. (TR 5-8)

4. Defendant requested that all witnesses be excluded from the Courtroom, including the Postal Inspector, Slavinski. The Court denied this request as to the Postal Inspector. (TR 18-20)

5. At the conclusion of the government's case the defendant moved pursuant to rule 29, F.R.Cr.P, for judgment of acquittal as a matter of law as to the indictment. The Court denied this motion. (TR241)

6. At the end of Defendants evidence, the motion for judgment of acquittal was renewed and again denied by the Court. (TR 264)

7. On December 11, 1974, defendant filed a motion to reconsider his motion to surpress evidence and to grant a rehearing on the motion because the scope of the warrant was exceeded. The Court denied it.

STATEMENT OF THE CASE

I. THE PROCEEDING BELOW.

James Henry Rollins, the appellant in this case, herein appeals from a judgment of conviction on indictment number S 74 Cr. 951 for two counts of aiding and abetting in a scheme to defraud by use of the mails.

On December 11, 1974, defendant was sentenced to three and one-half years for each violation, the sentences to run concurrantly. An appeal was timely noted by appellant before the Court on the day of sentencing.

II. STATEMENT OF FACTS

On or about September 4, 1974, Meehan called the appellant and told him that some money had arrived for him, from Niarobi, Kenya and was he expecting this money. Appellant acknowledged that he was expecting money from Niarobi on a wheat deal that was in the works. Meehan said that there was some irregularities about the payment orders and he would have to clear the release of the funds with his supervisor.

On Friday September 6, 1974, Cody called Meehan's office and asked id everything was o.K.. Meehan said that everything was fine and that the money would be credited to his business account on Monday.

On Monday about 9:45, Cody arrived at the bank and was arrested by the Postal inspector Slavinski, without probable cause and without a warrant.

Defendant was taken before a magistrate and charged with a violation of Title 18 U.S.C. 2313. Ten days later defendant was indicted for a violation of Title 18U.S.C. 1341. Twenty days later defendant was indicted on a superceding indictment for a violation of Title 18 U.S.C. 1341 &2; 1342 and 2113. Counts three and four were dismissed

ARGUMENT
I

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN THE CONVICTION OF AIDING AND ABETTING A SCHEME TO DEFRAUD BY USE OF THE MAILS; THEREFORE, THE TRIAL COURT SHOULD HAVE GRANTED DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL.

The primary purpose of the mail fraud statute, section 1341, as enacted by Congress, is to prevent the United States Postal Service, now a quasi-governmental agency, from being used to carry schemes to defraud into effect. DURLAND V UNITED STATES, 161 U.S. 306, 314, 16 S. Ct. 508, 511, 40 L. Ed 2nd 709 (1896). See also PARR V UNITED STATES, 363 U.S. 370, 389, 80 S. Ct. 1171, 1182, 4 L. Ed 2nd 1277 (1960).

The two basic elements of a mail fraud offense are (1) the scheme to defraud; representations known by the defendant to be false and misleading, and (2) mailing or knowingly causing a mailing for the purpose of executing the scheme. PEREIRA V UNITED STATES, 347 U. S. 1, 8, 74 S. Ct. 358, 362, 98 L. Ed. 435 (1954); See UNITED STATES V BRUCE, 488 F2d 1224, 1230 (5th Cir. 1973).

The mailing must be as the statute requires, "for the purpose of executing the scheme." KANN V UNITED STATES, 323 U.S. 88, 94, 65 S. Ct. 148, 151, 89 L. Ed 88 (1944). The two essential elements listed above must be proved beyond a reasonable doubt in order to convict a principal charged with a violation of Title 18 U.S.C. 1341. If this defendant had been charged as a principal there would be no way for the conviction to stand because the Government presented no evidence to show that this defendant devised a scheme to defraud or that he mailed or caused anything to be mailed.

The government knew that it could not convict the defendant as a principal so he was finally charged with aiding and abetting a violation of Title 18 U.S.C. section 1341. Section 2 of Title 18 says as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

The proof necessary for a conviction is as stated in the ninth Circuit Court of Appeals decision in HERNANDEZ V UNITED STATES, 300 F2nd 114 at 123:

> "An aider and abettor is made punishable as a principal... and the proof must encompass the same elements as would be required to convict any other principal."

See also MACK V UNITED STATES, 326 F2d 481 (8th cir. 1964)

Judge Learned Hand said in UNITED STATES V PEONI, 100 F2d 401, 402 (2nd Cir. 1938) that aiding and abetting requires evidence that the defendant:

> "In some sort associates himself with the venture, that he participates in it as in something that he wishes to bring about, that he seeks by his actions to make it succeed."

This would seem to suggest two general components necessary to show aiding and abetting. They are (1) an act or acts on the part of the defendant which contributes to the execution of a crime and (2) the intent to aid in its commission. See NYE & NESSEN V UNITED STATES, 336 U.S. 613, 619, 69 S. Ct. 766, 93 L. Ed 919 (1949); UNITED STATES V GREER, 467 F2d 1064,(1972).

From the cases cited supra, it becomes clear that if a defendant is charged with aiding and abetting a scheme to defraud by the use of the mails, the evidence must show that:

(1) A scheme was devised by someone to defraud some person and

(2) The United States Mail Service was used to facilitate the execution of this scheme,

(3) Further, the defendant must specifically intend by his conduct to aid and abet the mailing,

(4) With some knowledge that there is a scheme to defraud;

Otherwise, a conviction cannot stand.

Before I go into an analysis of the government's proof it is necessary to point out that the principal in the case is unknown. Because of this fact it is impossible to ascertain his state of mind. Further all of the alleged activity on the part of this unknown principal took place outside of the territorial limits of the United States. And finally there are no United States Postal Service markings on the envelopes.

Did the government present evidence of a mailing? No, the government presented no evidence to show that the payment orders were mailed. The government tried to remedy this by presenting testimony to show that the payment orders were received at the avenue B Branch of the Manufacturers Handover Trust Company. (TR 60-63)

On page 62 of the transcript the government's witness Mr. Portele, who was the only witness to testify as to a mailing, raised doubts on crossexamination when he testified as follows:

Q Does the Bank have a box where people can drop in deposits or other mail, outside the bank?

A Well, we have a night depository box which, of course the individual has to have a key for it, and we also have a slot in the door, where those that the key is not avialable to them, they could drop a deposit there.

Q So that, that mail at least would not have come through the mail, isn't that true?

Court It is mail, but it isn't mailed.

Q. Is it in an envelope most of the time?

A The deposits is contained in the envelope, yes.

Q And is it addressed to the bank?

A Some cases it is addressed to the bank. Some cases it is just a blank envelope.

This testimony suggests that it is possible that these payment orders were received, but did not necessarily move through the United States Mail.

In a very similiar case, United States v Joyce, 499 F2d 9 (7th Cir. 1974) addressee who was the only witness as to mailing testified that letter had been opened by his mail department and stamped accordingly, but that mail department also opened privately delivered letters. The Court held that use of the mails was not sufficiently shown to support mail fraud conviction.

In this case no indication is given on the payment orders as to when or how they were received. There is no receiving stamp on them. The witness himself was not the recipient of the mail. There is really no evidence as to how the letters got to Mr. Portele's desk. He has no recollection as to when they were received.

Most of the cases have held that there must be some indication as to how the mail arrived. Normally some type of stamp is placed on the letter showing the time and date of it's receipt. This was not the case here.

This Court held in UNITED STATES V BAKER, 50 F2d 122 (2nd Cir. 1931) that where evidence was presented to show that a LETTER WRITTEN IN ONE CITY WAS FOUND AT OFFICE OF ADDRESSEE with receiving stamp of addressee thereon is not enough to show it was sent through the mails. See also MACHETT V U.S., 90 F2d 462, where the proof that letter was written in one city and received in another was not sufficient to show use of mails to sustain conviction. It is obvious that the government did not show a mailing in this case.

Even if we assume that there was a mailing the government's burden of proof is not complete. The government must go further and present evidence to show conduct on the part of this defendant which contributed to the commission of the offense charge--- namely ---use of the mails in a scheme to defraud ---assuming that there was a scheme to defraud.

The Fifth Circuit Court of Appeals in GRIMES V UNITED STATES, 379 F2d 791 (1967) stated that:

> "In order to convict (defendant) as an aider and abettor the Government had to show conduct on his part amounting to counselling or other assistance in the prohibitive activity."

See also UNITED STATES V HONEYCUTT, 311F2d 660, (4th Cir. 1967). Mere association is not enough to show participation. RAMEREZ V UNITED STATES, 363 F2d 33 (1966).

Aiding and abetting is not proven from presence where an illegal act occurs. UNITED STATES V GARGUILO, 310 F2d 249, 253 (2nd Cir. 1962). There must be something more.

> "Without some further evidence of the quality of his participation (defendant's) presence where illegal activity was being transacted does not his knowledge of the nature of the activity." U.S. v INFANTI AND KARTZ, 474 F2d 522 (2nd Cir. 1973).

Now taking all of this into consideration, where is the proof from which the jury could reasonably infer that the defendant participated in a scheme to defraud by use of the mails. There was no evidence and the government did not produce any. There is no evidence that the defendant was present when the mails were used. There is absolutely no evidence that defendant was present where any illegal acts occurred. Nor did he himself do any illegal acts.

What was his participation in the crime? All the evidence that was presented as to the conduct of the defendant was legal and innocent. And where the evidence is evenly balanced between guilt and innocence, a conviction cannot stand.

The Court said in SHAWA V UNITED STATES, 94 F2d 1, that:

> "When all of the substantial evidence is as consistant with innocence as with guilt it is the duty of the appellate Court to reverse a conviction."

See INGRAM V UNITED STATES, 360 U.S. 672 (1959)

This was a circumstantial evidence case and

> "In circumstantial evidence cases, the trier of fact must reasonably find that the evidence excludes every reasonable hypothesis except that of guilt..." UNITED STATES V BRUCE, 488 F2d 1224 (5th Cir 1973)

It is obvious that the government did not show any participation or conduct on the part of the defendant in a scheme to defraud by use of the mails. Nor did the government present any evidence to prove the other component--knowlege that a crime was or had been committed by someone.

This particular crime requires that the government must prove more than just participation. It must sow that the defendant had a specific intent to aid in the commission of the offense charged. Thus, the evidence must show that any acts or conduct on the part of the defendant was done knowingly and willfully with the specific intent to aid and abet in the offense charged.

In criminal law, the words "knowingly and willfully" has no single fixed and uniformed meaning, which may bedependent on the character of the offense involved. It means with knowledge in the type of offense defendant is charged with, and commonly imports a perception of the facts requisite to make up the crime; or that state of mind wherein the person charged is in possession of facts under which he is aware he cannot do the act for which he is charged.

See UNITED STATES V GALLISHAW, 428 F2d 760 (2nd Cir 1970). In In the instant case it is necessary that the defendant have some knowledge that there is a scheme to defraud, and that the use of the mails were reasonably foreseeable in furtherance of that scheme.

To act "knowingly and willfully", it has been held means to act voluntarily and purposely, and not because of mistake, good faith or other innocent reasons. Ordinarily one is not guilty of a crime unless he is aware of the existance of all those facts which made his conduct criminal.

One Court said that:

> "Without knowledge, intent cannot exist.... Furthermore t establish the intent evidence of knowledge must be clear; not equivocal." DIRECT SALES CO. V U.S., 319 U.S. 703, 711.

Intent is a matter of fact and cannot be implied.

Criminal intent may be proved by direct and positive evidence or under other circumstances criminal intent may be proved by circumstantial evidence. SILVERMAN V U.S., 220 F2d 36 (8th Cir.) To warrant a conviction, the circumstances proved to establish the intent must be such that the requisite intent is reasonably deducible therefrom, must be wholly inconsistant with the theory of innocence; and are insufficient to establish the intent if, they are consistant with the absence of criminal intent, where they are equally consistant with innocence as with wrongdoing or where they furnish the basis for an inference of some intent other than necessary to constitute the crime charged.

Where a specific intent is a necessary ingrediant of the crime charged, as it is in this case, the evidence whether direct or circumstantial must be sufficient to establish intent beyond a reasonable doubt.

No evidence was presented, either direct or circumstantial, by the government, to show that this defendant did any act knowingly and willfully, with the specific intent to aid and abet a scheme to defraud by use of the mails. Nor can it be reasonably inferred from the evidence presented.

ARGUMENT
II

DID THE TRIAL COURT ERR IN ALLOWING INTO EVIDENCE TWO PASSPORTS SEIZED BY THE OAKLAND POLICE PURSUANT TO A DEFECTIVE SEARCH WARRANT AND AN ILLEGAL SEARCH AND SEIZURE?

The IV Amendment to the United States Constitution states in part that:

> "...No warrant shall issue, but upon probable cause, supported by Oath or affirmation and particularly discribing the place to be searched and the person or thing to be seized."

From the dictates of the constitution it would seem that for a warrant to issue two things must happen. First, there must be a verified affidavit setting forth the facts corstituting probable cause and second the thing or things to be seized must be described particularly. If this is a true statement of the law then the search and seizure in this case was definitely unconstitutional.

The affidavit for the search warrant that was present to Judge cannella for his ruling as to probable cause was defective on its face. It was not duly verified as is required by the constitution and the judge made his ruling on this unverified affidavit.

The Supreme Court held that an arrest upon a warrant issued on affidavits which were not properly verified was unlawful. See ALBRECHT V UNITED STATES, 273 U.S. 1, 47 S.Ct 250, 71 L.ED 505 (1927).

It would follow from a parity of reasoning that a search warrant issued pursuant to an unverified affidavit would also be illegal.

Not only was the affidavit defective but the search warrant itself was also defective. But be that as it may even if the search warrant had been valid the seisure would have still been invalid because the police officiers during the execution of the warrant exceed the scope of the warrant. The items seized were not specifically named in the search warrant as is required. This warrant specifically describe and states that the items to be seized was "a 9mm pistol and ammunition thereof" and makes no mention of passports. The Oakland Police in total disregard for the dictates of the warrant seized the passports in question among twenty or more other items not named in the warrant. The procedure was unlawful. See ALIOTO V UNITED STATES, 216 F supp. 48 (1963); UNITED STATES V LISLER, 21 F.R.D. 376 (D.C. PA 1958).

It is obvious that the trial judge in making his ruling to allow these passports into evidence, took none of these things into consideration. In making a ruling on probable cause he has placed himself in the same shoes as the issuing magistrate and he should have carefully read the affidavit and search warrant before making a ruling.

The Kentucky Court of Appeals in a recent ruling in ROOKER V COMMONWEALTH decided March 22, 1974, held that a judge's failure to read an affidavit before issuing the warrant is enough by itself to invalidate the warrant and spoil the resulting search, the Kentucky Court of Appeals stated:

"Where a judge issues a search warrant based upon an affidavit which he does not read, he makes no determination of probable cause, but merely serves as a rubber stamp for the police. Such action is improper even though the affidavit actually shows probable cause for the issuance of the warrant." (ROOKER V COMMONWEALTH;KY. CT. APP. 3/22/74)

It is obvious that Judge Canella did not read the affidavit and search warrant otherwise he wouldn't have allowed the passports into evidence. This caused the jury to be confused and it prejudiced the defendants trial and denied him due process of law. See; Aguilor v Texas, 378 U.S. 108 (1964); JONES V UNITED STATES, 362 U.S. 257 (1960); BECK V OHIO, 379 U.S. 89.

ARGUMENT
III

THE TRIAL COURT'S FAILURE TO SEQUESTER A MAJOR WITNESS, WHO MAY SHAPE HIS TESTIMONY IN A SUBSTANTIAL MANNER, SO AS TO CORROBORATE testimony of a fellow witness, and who in fact does do this, IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AS TO BE AN ABUSE OF DISCRETION WARRANTING A NEW TRIAL.

As pointed out in 6 Wigmore, § 1837 (3rd Ed), the practice of sequestering witnesses is deeply rooted in the history of justice. And the purpose for the time honored practice, "...is, of course, to deprive a later witness of the opportunity of shaping his testimony to correspondant tc that of an earlier one." 6 WIGMORE § 1838, p.352 (3rd Ed), TAYLOR V U.S., 388 F2d 786 (9th Cir. 1968).

Although in consideration of this purpose, there would seem to be no reason to distinquish one witness from another simply on the basis that one is the investigative agent and the other is not, it is too well established a principle, that it is within the trial court's discretion to except the investigative agent from the sequestration order to be argued generally here.

However, certain determinations should be made by the trial court as to the type of testimony to be offered by the non-sequestered witness and its important to the particular case, in order to protect the accused's fifth Amendment right to due process. Where the testimony is of a major witness and of a corroborative nature such that possible shaping of testimony presents a highly prejucicial danger to the accused, then the trial judge should carefully weigh this factor in considering whether such a witness should be sequestered, in order not to abuse this discretion.

If the trial judge allows the particular witness to be exempt from the sequestration order, then at the very least, the accused should be protected from the prejudicially dangerous possibilities of the shaping of testimony, by some reasonable procedure. In United States v Frazier, 417 F2d 1138 (7th Cir 1969), an F.B.I. agent in charge of the case, whose presence was necessary, was permit to remain in the courtroom, however, the Court felt he should ordinarily be called first, unless calling him first would unduly break the continuity and seriously impair the coherence of the government's proof. And in U.S. V PELLIGRINO, 470 F2d 1205 (2nd Cir 1972), the Court refused to order the sequestration of the F.B.I. agent in charge of the case and who was the last witness called, but before the agent began his testimony the Court pointed out to the jury that the witness had heard all the previous evidence while seated at the counsel's table.

Here, the Postal Inspector, the major witness for the government, was allowed to remain at counsel's table throughout the testimony offered by Joseph Meehan, whose testimony he tried to corroborate. As part of the testimony offered by both witnesses was to the same event, it would not have unduly broken the con-

tinuity of the government'sproof, to require the non-sequestered to testify first. Nor did the trial judge point out to the jury that the non-sequestered witness had heard the testimony of the previous witness, as was suggested in the PELLIGRINO case. Either of these two procedures would have possibly protected the accused's rights. However, none of these things were done.

Much of the testimony offered by Slavinski hinged on two or three key words and was obviously shaped in order to corroborate the testimony of Meehan; whose testimony he heard in full just before testifying. As it can be clearly seen by his use of the key words "...past sale...", in his testimony even though these words were not included in his report written approximately four days after the arrest. This was brought out on cross-examination and lends weight to the conclusion that he did try to shape his testimony to that of the the witness he heard. (TR 131)

Thus evidence of a grave a nature as this and possibly was an important influence on the jury, under due process rules of fair play, should have been dealt with either by exclusion of the postal inspector or by one of the procedures set forth in FRAZIER or PELLIGRINO. The prosecutor is assumed fully able to try his case on its and his merits without any need to rely on as potentially dangerous strategum as failure to sequestor or protect against a knowing built in shaping situation; especially when a shaping situation did occur.

It can be seen that a postal inspector trying to get a conviction, allowed to follow the testimony of a fellow witness, and to try to make his testimony conform to that of his predecessor's testimony, is dangerouly offensive to the fifth Amendment's due process clause and as such must constitut a departure from the accepted and usual course of of fair judicial proceedings

ARGUMENT
IV

WAS THE JURY'S VERDICT IMPROPERLY AND PREJUDICIALLY INFLUENCED BY THE EXCESSIVE PARTICIPATION OF THE TRIAL JUDGE IN THE TRIAL AND BY HIS GROSSLY INADEQUATE INSTRUCTIONS TO THE JURY.

It is well established that the trial judge has the authority to interrogate witnesses. But it is equally well established that the judge should, in doing this, preserve an attitude of impartiality and must not assume the role of an advocate or of a prosecutor. UNITED STATES V LEE, 107 F2d 522, 525 (7th Cir. 1939). And where it can be shown that he does step out of his role as impartial moderator and does usurp the function of the prosecutor the Appeals Court should reverse and remand for a new trial.

A judge's participation in the trial should be limited to asking questions in order to obtain a clear presentation of the issue. This should be done in a way so as not to impress the jury with the idea that the judge has a fixed opinion that the accused is guilty and should be convicted. This is particularly true when the evidence is in sharp conflict. A trial judge's excessive interjection into the examination of witnesses and his numerous hostile comments to the defendant may indicate such bais and lack of impartiality as to warrant a new trial. U.S. V KENNEDY, 291 F2d 457, 459 (2nd Cir. 1961). It is not part of the judge's duty to caution or advise the Government attorney in order to supply some deficiency in proof of testimony favorable to the government. And when the judge begins to offer items into evidence it becomes even more apparent that he has usurped the role of the prosecutor. See: UNITED STATES V CARENGELLA, 198 F2d 3, 8 (7th Cir 1952) This is especially true in a close case.

Counsel is not held to strict accountability for failure to object or except when the questions are asked by the Court or when the Court has taken over and usurped the function of the prosecutor. STEVENS V U.S., 306 F2d 834, 838 (5th Cir 1962).

On numerous ocassions during the course of this trial, Judge Cannella stepped out of his role as impartial moderator and actively usurped the role of the prosecutor. Quite often he took over the interrogation of the witnesses after both prosecutor and and the defendant had finished. i.e. see (TR 177). He went much further than just interrogating the witness. On several occassions he even led the witness with leading questions. This occurred when he rather than the prosecutor, was so engrossed in trying to establish a mailing. He asked several leading questions in trying to get the answer he wanted. (TR 57)

During the Testimony of Portele, the Judge actually took over the testimony entirely from the prosecutor. (TR 55-56) When the witness wouldn,t answer the question the way he thought it should be answered he became angry. This caused the witness to answer the questions according to his dictates. He even advised the prosecutor to establish a mailing through "custom and Usuage", when it became apparant that the prosecutor couldn't establish a mailing with the witness that he had. Finally, he had to tell the prosecutor how to ask the question so as to get the answer desired. (TR 56)

At one point he became so impatient that he didn't even wait for the witness to answer, he answered the question for him: thus putting words in the witnesses mouth;

> "Gave you the envelope and the other piece of paper." (TR-57)

The defendant was afraid to object because he did not want to incur the anger of the judge.

When Segrid Lewis, another government witness, had finished testifying the Court again took over the interrogation, and lead the witness into saying that she knew the defendant by another name even though she qualified he statement. (TR 186-188). On page 186 of the transcript this witness answered the leading question of the Court by saying;

> "Yes, I do. The color is a little different, the facial and hair is a little darker, but I recognize the voice."

Since the defendant was questioning the witness this was a shrewd way of having the witness testify against himself in violation of his Fifth Amendment Rights.

The Court in U.S. V BRYANT said:

> "If counsel were allowed routinely to lead a witnes on direct examination, the evidence elicited would all too often be that of the lawyer, not of the witness."

If the principle applies to counsel it should apply even more so to the judge when he is participating in the trial. See J. MAGUIRE, EVIDENCE---COMMON SENSE AND COMMON LAW at 44 (1941) The witness would be more predisposed to accept suggestions offered by the Court, especially with the aura of a Diety about him, than from Counsel. This makes the conduct even more offensive. Thus, Judge Cannella was way of of line and abused his discretion.

This should have been enough, but not for this judge, he went much further in his role as prosecutor and during the testimony of Professor Humval, he actually offered and admitted into evidence a photograph from the law school files that was purported to be the defendant. Neither the Government nor the defendant had made such an offer. (TR 177). This type of participation was highly irregular on the part of a Judge. The is no doubt in my mind that he was acting as prosecutor in this case and this was an abuse of discretion.

My final point of argument under this section is on the instructions to the jury. The Judge should have instructed the jury in clear plain lanquage as to the law. This was not done in the case at bar, especially in relationship to his instructions on aiding and abetting. He simply read from the statute and did not give a clear definition of the actual meaning of the term aiding and abetting. This failure to instruct as required deprived the defendant of a fair trial. The jury has to know and understand what the law is before a verdict can properly be rendered. If the instructions are lacking or inadequate then it is not possible for the jury to reach a correct decision.

On of the main defenses of the defendant was a lack of evidence of knowledge on the part of the defendant to have the necessary intent to aid and abet. When a request was made as to this type of instruction the Judge refused and left his instructions as they were. This instruction on Lack Of Evidence was not enough. The Jury deserved more. These are layman and there understanding of the law is nil. It is up to the Judge to correctly instruct them so that they can understnad what he is talking about and so that they can evaluate the evidence and reach a correct verdict.

In UNITED STATES V BRYANT, 461 F2d 912 (6th Cir 1972), the Court said:

> "We have consistantly held that it is the duty of the trial judge to tell a jury what facts they must find before they can convict--that is, to instruct the jury as to the elements of the crime charged."

See also UNITED STATES V RYHICKI, 403 F2d 599, 602 (6th Cir 1968); UNITED STATES V BYRD, 352 F2d 570, 572-574 ("nd Cir. 1965)

As stated above, specific criminal intent is an essential element of the offense of aiding and abetting and the judge's

instructions as to the Government's lack of proof to show intent was grossly inadequate.

CONCLUSION

WHEREFORE, for the reasons set forth in points I through IV of the arguments supra, appellant respectfully request that this Court reverse the judgment of conviction with directions to enter a judgment of acquittal, or at the very least, the Appellant submits, a new trial must be granted.

Respectfully submitted Pro-se

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17 March 1975

P J Calabro

Public Officer - Authorized
Act of July 7, 1955, to ad...
later oaths (18 U.S.C. 4004)

CERTIFICATE OF SERVICE

It is hereby certified and [illegible]ed that on this 17 day of march, 1975, the undersigned did send a true copy of this brief to RICHARD WILE, Assistant United States Attorney at the U.S. Courthouse, Foley Square, In the City of New York State of New York, via U.S. Mail.

Robert R. Cody

AFFIANT Robert R. Cody

SWORN TO AND DESCRIBED BEFORE ME THIS

17 DAY OF March 1975.

by Calabro

FEDERAL PAROLE OFFICIER

Parole Officer [illegible]
Act of July 7, 1955. [illegible]
lster oaths (18 U.S.C. [illegible])